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4 **UNITED STATES DISTRICT COURT**

5 **DISTRICT OF NEVADA**

6 JOHN MARSHALL,)
7) 2:06-CV-0536-RCJ-GWF
8 Plaintiffs,)
9)
10 vs.) **ORDER**
11 Defendants.)
12 _____)

13 This matter comes before the Court on Defendant Dawn Reeps's Motion to Dismiss
14 Amended Complaint. (#180.) The Court has considered the Motion, the pleadings on file,
15 and oral arguments on behalf of the parties and issues the following Order.

16 **BACKGROUND**

17 Plaintiff's ex-wife, Ellen, enrolled their son in the Swift River Academy, "a private
18 college preparatory therapeutic boarding school." This controversy arises because Plaintiff
19 was charged on his credit report with unpaid Swift River bills in excess of \$30,000, for which
20 Plaintiff claimed no responsibility. On May 1, 2006, Plaintiff filed his lengthy Complaint
21 (#1) with this Court (Judge Hunt), alleging forty-seven claims for relief against over a dozen
22 defendants in relation to the problems in his credit report. Although Plaintiff's Complaint
23 lacked clarity, he basically alleged that the non-reporting agency defendants in this action
24 incorrectly reported information to the various credit reporting agencies. Plaintiff further
25 alleged that the actual reporting agencies themselves failed to comply with the Fair Credit

1 Reporting Act (“FCRA”), and that Reeps, a Trans Union employee, is liable for her actions
2 while working at Trans Union. This Court then dismissed several claims against some
3 defendants. On January 19, 2007, this Court later issued an order granting in part Defendant
4 Reeps’s Motion for Judgment on the Pleadings. Specifically, the Court granted Reeps’s
5 Motion with leave to amend as to counts seven through twelve. Plaintiff later filed his
6 Amended Complaint as ordered by this Court. Although Plaintiff filed his Amended
7 Complaint pursuant to this Court’s order, he has now also filed a Motion for Leave to Amend
8 pursuant to Rule 15.

9 **DISCUSSION**

10 **I. Defendant Reeps’s Motion to Dismiss**

11 On January 18, 2007, the Court issued an order granting Defendant Reeps’s
12 Motion for Judgment on the Pleadings. The Court dismissed Plaintiff’s FCRA claims
13 against Reeps (Counts 7-8) because Plaintiff failed to allege that Reeps fell within one
14 of the three categories of Defendants that the Ninth Circuit has held may be sued under
15 the FCRA. The Court dismissed these claims with leave to amend. The Court also
16 dismissed with prejudice some of Plaintiff’s FCRA claims that could not be brought as
17 a private cause of action. The Court also dismissed Plaintiff’s Nevada consumer
18 reporting claims patterned after the FCRA (Counts 9-10) for the same reasons as the
19 FCRA claims. Finally, the Court dismissed Plaintiff’s claims for libel.

20 **A. Standard**

21 Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, dismissal is
22 appropriate if the plaintiff “fail[s] to state a claim upon which relief can be granted.”
23 Dismissal for failure to state a claim under Rule 12(b)(6) is proper only if it is beyond
24 doubt that the plaintiff can prove no set of facts in support of the claim that would

1 entitle the plaintiff to relief. *Williamson v. Gen. Dynamics Corp.*, 208 F.3d 1144, 1149
2 (9th Cir. 2000). The review is limited to the complaint, and all allegations of material
3 fact are taken as true and viewed in the light most favorable to the plaintiff. *In re Stac*
4 *Elecs. Sec. Litig.*, 89 F.3d 1399, 1403 (9th Cir. 1996). Although courts assume the
5 factual allegations to be true, courts should not “assume the truth of legal conclusions
6 merely because they are cast in the form of factual allegations.” *W. Mining Council v.*
7 *Watt*, 643 F.2d 618, 624 (9th Cir. 1981).

8 On a motion to dismiss, the court “presumes that general allegations embrace
9 those specific facts that are necessary to support the claim.” *Lujan v. Nat'l Wildlife*
10 *Fed'n*, 497 U.S. 871, 889 (1990). However, conclusory allegations and unwarranted
11 inferences are insufficient to defeat a motion to dismiss under Rule 12(b)(6). *In re Stac*
12 *Elecs.*, 89 F.3d at 1403. If either party submits materials outside of the pleadings in
13 support or in opposition to the motion to dismiss, and the district court relies on these
14 materials, the motion may be treated as one for summary judgment. *Anderson v.*
15 *Angelone*, 86 F.3d 932, 934 (9th Cir. 1996).

16 **B. Counts Seven & Eight—Plaintiff's FCRA Claims**

17 Plaintiff claims Defendant Reeps is subject to civil liability pursuant to 15
18 U.S.C. §§ 1681n-1681o. 15 U.S.C. §§ 1681n and 1681o create civil liability for willful
19 and negligent noncompliance, respectively, by a consumer reporting agency, user, or
20 furnisher of information who fails to comply with the provisions of the FCRA. 15
21 U.S.C. §§ 1681n-1681o; *Nelson v. Chase Manhattan Mortgage Corp.*, 282 F.3d 1057,
22 1060 (9th Cir. 2002); *Hansen v. Morgan*, 582 F.2d 1214, 1219 (9th Cir. 1978). 15
23 U.S.C. §§ 1681n and 1681o were amended in 1996 such that civil liability for
24 noncompliance with the FCRA applies to “any person” who fails to comply with the

1 requirements of the FCRA. *Nelson*, 282 F.3d at 1060. However, the Ninth Circuit has
2 explained and held that this amendment, and the language “any person” in the FCRA,
3 only expanded the class of defendants subject to civil liability under the FCRA to
4 include three potential defendants: (1) furnishers of credit information; (2) consumer
5 reporting agencies; and (3) users of information. *Id.* at 1060. According to the Ninth
6 Circuit, the words “any person” only include the above three potential defendants
7 because “there are involved in any credit transaction only the consumer, the [credit
8 reporting agencies], the user of the credit reports and the furnishers of the credit
9 information.” *Id.* Thus, in order to state a valid claim under the FCRA, a plaintiff must
10 allege the defendant is within the three classes of defendants subject to FCRA liability.

11 *Id.*

12 In his Amended Complaint, Plaintiff correctly alleges that Reeps is a person as
13 defined under § 1681a(b). However, Reeps must also be a person as defined under §
14 1681a(b) who is either (1) a furnisher of credit information, (2) a credit reporting
15 agency, or (3) a user of credit information. *Id.* Plaintiff has failed to so allege.

16 First, the term “consumer reporting agency” means:

17 . . . any person which, for monetary fees, dues, or on a cooperative nonprofit
18 basis, regularly engages in whole or in part in the practice of assembling or
19 evaluating consumer credit information or other information on consumers for
the purpose of furnishing consumer reports to third parties, and which uses
any means or facility of interstate commerce for the purpose of preparing or
furnishing consumer reports.

20 § 1681a(f). Plaintiff does not allege that Reeps is a consumer reporting agency. He does
21 allege that Trans Union, Reeps’s employer, is a credit reporting agency, but he only alleges
22 that Reeps is an employee or an agent of Trans Union. In his Opposition, Plaintiff alleges
23 that Reeps is a person and that a credit reporting agency is any person. Thus, he implies that
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1 Reeps satisfies the credit reporting agency definition. However, Plaintiff fails to cite the
2 remaining portion of the credit reporting agency definition—"any person which, for monetary
3 fees . . ." Plaintiff further clarifies his allegation as to Reeps in his Opposition: "Defendant
4 Reeps is a person working for a consumer reporting agency . . ." (#191 at 10.) Thus,
5 Plaintiff clearly alleges that Reeps is not a credit reporting agency, but rather an employee of
6 one. Ninth Circuit precedent has not equated an employee of a credit reporting agency with
7 the agency itself. The only case directly addressing this issue is a California appellate court
8 case interpreting the California version of this statute, which is patterned after the FCRA and
9 has the identical definition of credit reporting agency. The California court held that a credit
10 reporting agency employee is not a credit reporting agency when there is "no evidence that
11 fees were paid to him personally as opposed to the corporation." *Cisneros v. U.D. Registry, Inc.*, 46 Cal. Rptr. 2d 233, 255 (Cal. Ct. App. 1995). Neither Plaintiff nor Defendants
12 provide any argument why the Court should find otherwise. Reeps, as an employee, collected
13 no fees. Thus, although Plaintiff correctly argues that Trans Union has potential liability
14 based on Reeps's actions, he has not alleged Reeps is a credit reporting agency.

16 Second, the term "furnisher of credit information" means one who provides credit
17 information to consumer reporting agencies. *Nelson*, 282 F.3d at 1059-60. A furnisher is
18 liable under the FCRA only if it does not respond to a formal notice of consumer dispute
19 from a consumer reporting agency. 15 U.S.C. § 1681s-2; 15 U.S.C. § 1681i(a)(2); *Nelson*,
20 282 F.3d at 1060 (holding that Congress set up 15 U.S.C. § 1681s-2(b) as a "filtering
21 mechanism" wherein a disputatious consumer notifies a consumer reporting agency which in
22 turns notifies the furnisher, and only a nonresponsive furnisher may be privately sued).
23 Plaintiff has not alleged that Reeps is a "furnisher" of credit information.

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Finally, Plaintiff fails to allege that Reeps was a user of information in either his Amended Complaint or Opposition. While some federal courts have held that employees of credit reporting agencies may be “users” when that employee is the ultimate destination of the credit report, *see, e.g., Yohay v. Alexandria Employees Credit Union*, 827 F.2d 967 (4th Cir. 1987), Plaintiff has failed to so allege in this instance. Accordingly, Plaintiff fails to allege Defendant Reeps is a credit reporting agency, furnisher, or user of information.

1. No Agency Liability as to Reeps

As noted above, Plaintiff correctly states that an employer may be held liable under the FCRA for an employee's actions. However, Plaintiff also argues that Reeps, as an agent, is liable even though she is not a reporting agency, user, or furnisher.

When agency principles are applied to the FCRA, federal courts favor application of the general common law of agency rather than the law of any particular state. *See Ashby v. Farmers Group, Inc.* 261 F. Supp. 2d 1213, 1222 (D. Or. 2003); *see also Kodrick v. Ferguson*, 54 F. Supp. 2d 788, 794 (N.D. Ill. 1999) (noting that the legislative history of the 1996 amendments to FCRA “indicate[] that Congress did not intend that we establish differing rules for subscribers based on the agency law in each forum.”). Federal courts in the Ninth Circuit have adopted the *Restatement of Agency* as the basis for federal common law. *Ashby*, 261 F. Supp. 2d at 1222 (citation omitted).

Plaintiff and Trans Union entered into a contract. Reeps was Trans Union's employee or agent. Under the agency law as adopted by the Ninth Circuit, for purposes of FCRA liability, an agent is not liable when she acts for a disclosed principal. *Id.* at 1222-23. The parties do not dispute that Reeps was acting for a disclosed principal—Trans Union. Accordingly, Reeps is not be liable for actions she took as Trans Union's agent. *Id.*

1 Plaintiff has again failed to allege that Defendant Reeps qualifies as one of the three
2 potential defendants as required by the Ninth Circuit. Further, Plaintiff fails to demonstrate
3 that he may hold Reeps liable as Trans Union's agent. The Court has permitted Plaintiff to
4 amend his Complaint more than once, and any further amendments would be futile. Thus,
5 the Court dismisses with prejudice Counts seven and eight as they relate to Defendant Reeps.

6 **C. Counts Nine & Ten—Nevada Consumer Reporting Act Violations**

7 In counts nine and ten to his Complaint, Plaintiff accuses Reeps of violating the
8 Nevada Consumer Reporting Act (“NCRA”). Specifically, Plaintiff alleges that the credit
9 reporting agency defendants violated §§ 598C.160(1) and 598C.200. The NCRA’s plain
10 language clearly states that these two sections under which Plaintiff alleges liability apply to
11 “Reporting Agencies” or users. Nev. Rev. Stat. Ann. §§ 598C.160(1), 598C.200. The
12 NCRA defines Reporting Agency as any “person who, for fees, dues or on a cooperative
13 nonprofit basis, regularly engages in whole or in part in the business of assembling or
14 evaluating information regarding the credit of or other information regarding consumers to
15 furnish consumer reports to third parties, regardless of the means or facility of commerce
16 used to prepare or furnish the consumer reports.” § 598C.100. Thus, the definition is
17 virtually identical to the FCRA discussed above. Plaintiff does not allege that Reeps is a
18 “Reporting Agency;” rather, Plaintiff alleges that Reeps is a reporting agency “employee.”
19 As analyzed above, under applicable agency theory law, Plaintiff may sue Trans Union for
20 Reeps’s actions, but he cannot sue Reeps as Trans Union’s agent. Accordingly, the Court
21 dismisses with prejudice these claims as they relate to Defendant Reeps.

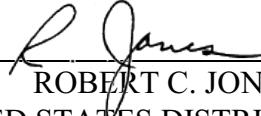
1 **D. Counts Eleven & Twelve—Libel and Libel Per Se**

2 Plaintiff also argues that Reeps committed libel by violating the FCRA statutory
3 requirements. The FCRA allows a plaintiff to bring a related libel claim if the plaintiff
4 demonstrates the defendant violated the FCRA. *See 15 U.S.C. § 1681h(e).* Because
5 Plaintiffs' FCRA claims against Reeps fail as a matter of law, his claims for libel based on
6 Reeps's alleged statutory violations also fail. *See id.* Therefore, the Court dismisses with
7 prejudice Plaintiff's claims for libel and libel per se.

8 **CONCLUSION**

9 Pursuant to the above analysis, IT IS HEREBY ORDERED that Defendant Reeps's
10 Motion to Dismiss (#180) Plaintiff's Amended Complaint is *granted* and the Court dismisses
11 with prejudice Plaintiff's claims against Defendant Reeps.

12 DATED: June 18, 2007

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15 ROBERT C. JONES
16 UNITED STATES DISTRICT JUDGE
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